SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 7, 1974

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction to Review	2
Questions Presented	2
Statutes Involved	4
Statement	4
Reasons For Granting The Writ	11
A. The Contempt Order is Final Because it is Essentially a Criminal Contempt Order	15
B. The Contempt Order is Final (Whether Criminal, Civil, or Both) Because the Damage Occasioned by the Order is Immediate and Irreparable Whether IBM Produces the Privileged Documents or Pays an Astronomical Fine	19
C. If not an Appealable Criminal Contempt, or an Appealable Final, Separable Civil Contempt, the Order Below is Hybrid and Is Appealable	25
D. The Contempt Order Is Outside the Scope of the Expediting Act Because It is Separable from the Government's Antitrust Case	26
Conclusion	29
Exhibit A:	
Motion for Leave to File, and to Treat, Annexed Petition for a Writ of Certiorari as a Petition for a Common Law Writ of Certiorari	31

TABLE OF AUTHORITIES

CASES	PAGE
American Communications Ass'n v. Douds, 339 U.S. 382 (1950)	23
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	22
Boylan v. Detrio, 187 F.2d 375 (5th Cir. 1951)	18
Capitol Co. v. Fox, No. L 59-192 (S.D.N.Y. May 3, 1935)	14
Capitol Co. v. Fox, No. L 59-192 (S.D.N.Y. July 18, 1935)	14
Chapman v. Goodman, 219 F.2d 802 (9th Cir. 1955)	21
Christensen Engineering Co., *In re*, 194 U.S. 458, (1904)	15
Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 F. 774 (2d Cir. 1905)	18
Crowell v. Benson, 285 U.S. 22 (1932)	22
Dennis v. United States, 341 U.S. 494 (1951)	23
Fox v. Capitol Co., 229 U.S. 105 (1936)	11-14, 24-25, 27
Harris v. United States, 413 F.2d 314 (9th Cir. 1969)	20
House v. Mayo, 324 U.S. 42 (1945)	2
Johnson v. Zerbst, 304 U.S. 458 (1938)	8
MacNeil v. United States, 236 F.2d 149 (1st Cir.), *cert. denied*, 352 U.S. 912 (1956)	16
McCrone v. United States, 307 U.S. 61 (1939)	16-17
McKee Glass Co. v. H. C. Fry Glass Co., 248 F. 125 (3d Cir. 1918)	18
Merchants' Stock and Grain Co., *In re*, 223 U.S. 639 (1912)	15
New York Telephone Co. v. Communications Workers, 445 F.2d 39 (2d Cir. 1971)	19, 23-25
Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920)	21

PAGE

Parker v. United States, 153 F.2d 66 (1st Cir. 1946) 18

Reisman v. Caplin, 375 U.S. 440 (1964) 19-22, 24-25

St. Regis Paper Co. v. United States, 368 U.S. 208 (1961) 21

Appeal of Securities and Exchange Comm'n, 226 F.2d 501 (6th Cir. 1955) 21

Shillitani v. United States, 384 U.S. 364 (1966) 18

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 19, 23-25

620 Church St. Building Corp., *In re,* 299 U.S. 24 (1936) 2

Union Tool Co. v. Wilson, 259 U.S. 107 (1922) 15

United States v. Aberbach, 165 F.2d 713 (2d Cir. 1948) 18

United States v. California Cooperative Canneries, 279 U.S. 553 (1929) 26

United States v. Costello, 16 F.R.D. 428 (S.D.N.Y. 1954), *aff'd,* 222 F.2d 656 (2d Cir.), *cert. denied* 350 U.S. 847 (1955) 21

United States v. CIO, 335 U.S. 106 (1948) 23

United States v. Delaware & Hudson Ry., 213 U.S. 366 (1909) 23

United States v. International Union, United Mine Workers, 190 F.2d 365 (D.C. Cir. 1951) 16

United States v. Morton Salt Co., 338 U.S. 632 (1950) 21

United States v. Ryan, 402 U.S. 530 (1971) 22

United States v. Roundtree, 420 F.2d 845 (5th Cir. 1970) 20

United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) 22-23

United States v. United Mine Workers, 70 F. Supp 42 (D.D.C. 1946), *modified and affirmed,* 330 U.S. 258 (1947) 6-7, 12-14, 16-18

PAGE

Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651 (1915) 20

Wilmot v. Doyle, 403 F.2d 811 (9th Cir. 1968) 20

Yanish v. Barber, 232 F.2d 939 (9th Cir. 1956) 18

Ex Parte Young, 209 U.S. 123 (1908) 20

STATUTES

15 U.S.C. § 29 (the Expediting Act) 15, 22, 26

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1651(a) .....*passim*

Fed. R. Civ. P. 37 (b) 28

ARTICLES

Comment, Civil and Criminal Contempt in the Federal Courts, 57 Yale L.J. 83 (1947) 18

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, International Business Machines Corporation ("IBM"), respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1973.

Opinions Below

The district court's Contempt Opinion, filed on August 1, 1973, is at II App. H.* The Contempt Order is found at II App. G.

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* References to "II App." are to the concurrently submitted separate Appendix containing relevant portions of the Record since the filing of IBM's earlier and still pending applications in this Court for review of the district court's holding (the "Waiver Order") that IBM's attorney-client and work-product privileges were waived by complying with the order of another federal court. Those applications are described in IBM s concurrently filed Petition for a § 1651(a) Writ to the United States District Court for the Southern

The December 17, 1973, decision of the Second Circuit, holding (2-1) that the Court of Appeals lacked jurisdiction to review the Contempt Order by appeal or mandamus, has not yet been officially reported and is at II App. I.

Jurisdiction to Review

This Court has jurisdiction to issue the prayed-for Writ under 28 U.S.C. § 1254(1) or 28 U.S.C. § 1651(a).*

Questions Presented

This Petition (like other applications for review filed in this Court on this matter) fundamentally seeks review of the district court's ruling that a party's attorney-client and work-product privileges are waived by involuntary and inadvertent production of documents to another litigant in response to the document production and protective orders of another federal court.**

District of New York seeking direct review in this Court of the Contempt and Waiver Orders.

References to "App." are to the separate printed Appendix previously submitted by IBM in connection with the earlier applications in this Court for review of the Waiver Order.

* Because the Court of Appeals found it lacked jurisdiction over the merits of the appeal, there may be some question whether the case was "in" the Court of Appeals within the meaning of 28 U.S.C. § 1254(1). *House* v. *Mayo*, 324 U.S. 42, 44 (1945). In such a case this Court may exercise jurisdiction under 28 U.S.C. § 1651. *In re 620 Church St. Building Corp.*, 299 U.S. 24 (1936). In the event this Court finds that this case was not "in" the Court of Appeals, IBM has annexed to this Petition as Exhibit A a motion for leave to file, and to treat, this Petition as a Petition for a common law Writ of Certiorari to the Court of Appeals for the Second Circuit. *See Rule 30 of the Rules of the Supreme Court of the United States.*

** If this Court finds that the Second Circuit erred in not asserting jurisdiction over that question, this Court may itself review the underlying merits of the Contempt Order by means of this Writ of Certiorari rather than remand the case to the Court of Appeals for its determination. *House* v. *Mayo*, 324 U.S. 42, 44-45 (1945). Therefore, Petitioner incorporates by reference the argument on the underlying merits in its concurrent Petition for a § 1651 Writ directed to the Southern District of New York.

The reasons why this Court should review the merits underlying the district court's Contempt Order are separately covered in IBM's concurrently filed application for an extraordinary writ pursuant to 28 U.S.C. § 1651. In this paper, argument is limited to the following questions presented by the decision of the Court of Appeals that it was without jurisdiction to review the Contempt Order:

1. Whether the Court of Appeals had jurisdiction to review the Contempt Order of the district court below (by appeal or mandamus) because the Order, although styled a "civil" contempt,* in fact was at least in part not a "civil" contempt for these reasons:

(a) it was entered for the purpose of vindicating the district court's authority;

(b) it was entered without consideration of the character and magnitude of the harm which would be suffered, if any, by the Government by reason of failure to obey the district court's Waiver Order (indeed, the question of harm was ruled irrelevant by the district court); and

(c) it directs a staggering daily fine of $150,000 for each day of noncompliance—a sum which has no ascertainable purpose other than to vindicate the district court's authority and (since the district court refused a stay) to preclude testing the validity of its production order (the fine was stayed by the Second Circuit on January 2, 1974, pending this Court's final disposition of the matter).

2. Whether, even if the Contempt Order be considered wholly "civil", the especially compelling circumstances here—including the facts that (i) this contempt is a good faith challenge to the merits of the Waiver Order (which invades a fundamental

* If the Order was, in substance, wholly or partially criminal, the Government conceded and the Second Circuit recognized that the Court of Appeals would have jurisdiction to entertain an appeal. (II App. I, at 161a-162a)

right), (ii) without appellate review of the Contempt Order now, IBM will suffer irreparable injury by giving the Government its privileged documents, and (iii) the Contempt Order is in every respect final, nothing of it remains in the district court below, and it is unrelated to the merits of or relief sought by the antitrust action, which is continuing now with no interruption—make this case like the decisions of this Court approving appellate review of such orders.

These questions focus upon the misuse of form—the adoption of the label and some trappings of "civil" contempt—in what we believe was a transparent attempt by the Government and the district court to cut off substantive rights by shielding the Contempt Order (and the underlying Waiver Order) from review by higher authority. In Point 1 we emphasize the important, but essentially technical, reasons why the Contempt Order here should be treated as wholly or partially "criminal" and, therefore, appealable. In Point 2, however, we try to lay this Contempt Order alongside this Court's policies governing appealability. These policies, we submit, do not result in the exaltation of form over substance and assure appellate review when it is fundamentally unfair not to review a significant decision of an inferior court affecting vital rights and principles.

Statutes Involved

The statutes involved in this case are 28 U.S.C. § 1291 and § 1651(a), and 15 U.S.C. § 29, which are set forth at the end of this Petition.

Statement

The contempt adjudication below originated in the attempt of IBM, and its attorneys, to secure prompt appellate review, in the manner repeatedly suggested by the Govern-

ment, of an Order compelling the production of privileged documents—an Order found unlawful by the only judges to reach the merits on two appeals in which a majority of the Court of Appeals held that Court was without jurisdiction.

On August 1, 1973, the district court held IBM in contempt of that Pretrial Order and fined it $150,000 per day each day that Order was not complied with. By the express terms of the Contempt Order, this penalty continues until "this action is finally terminated and all appeals have been completed." (II App. G, at 140a)

Thus, the district court ordered IBM to pay more than $1,000,000 per week and more than $54,000,000 per year* unless it bows to the Waiver Order which was not only once held unlawful, but which (i) is based on a rule of law in direct conflict with the rules and precedent of this Court, (ii) retroactively annuls the protective orders of another district court, (iii) destroys a fundamental substantive right—the right to the attorney-client privilege, (iv) stands in direct conflict with the rulings of other federal courts on similar facts, and (v) nullifies the efforts of another United States District Court to administer a complex and document-laden case in an efficient and expeditious manner.

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* The Government's antitrust action does not seek damages, but if proceedings in that action were to last five years, IBM would have to pay more than $273 million and forfeit more than $50 million in interest (compounded at 7%) if it could not obtain review of the merits of the Waiver Order now, and nevertheless still sought to keep the privileged documents from the Government. Despite the suggestion of the Second Circuit's majority to the contrary (II App. I, at 170a), this is not a meaningful or realistic alternative: how could IBM ever justify spending sums of that magnitude on the speculation that (a) it will lose the antitrust judgment, *and* (b) it will obtain reversal on the merits of the Waiver Order in its appeal from the final judgment?

No justification was stated for the unprecedented—indeed, devastating—fine imposed by the district court except "the court's belief that a substantial fine is required to insure compliance with its order." (II App. H, at 150a)

There were no findings (and there was no evidence) of grave national peril, impending catastrophe or disaster, or disrespect for the authority or person of the district court. Indeed, on the Government's motion to suppress discovery sought by IBM before the contempt hearing began, the district court ruled irrelevant the questions of whether the Government would be harmed by not receiving the privileged documents and the extent of any such harm (II App. E) and his findings of fact reject any suggestion of harm.* (II App. H)

The Court of Appeals—despite this Court's decision in *United States* v. *United Mine Workers*, 330 U.S. 258, 304 (1947), that a court "must . . . consider the character and magnitude of the harm threatened by continued contumacy" before imposing a civil contempt order—held, *inter alia*,

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* If the question of delay of the antitrust litigation were properly in issue, as it is *not* under the district court's rulings, IBM would show that the reason this case has not been concluded is because the Justice Department has failed to prosecute with any vigor. From January 1969, when the antitrust case was filed, until 1972, the Government did almost nothing to prosecute it, relying instead on discovery in private antitrust actions against IBM, primarily in the District of Minnesota. In addition, the Government waited some 17 months to bring on the motion which led to the entry of the Waiver Order.

Nor is there any basis for suggesting that production of privileged documents has been opposed for the purposes of delaying this action. The fact is that two well-funded private antitrust cases against IBM, *Greyhound* v. *IBM* and *Telex* v. *IBM*, have been filed and tried during the time the Government's action has been pending. Both companies are competitors of IBM, and their actions were tried after full discovery within 20 and 15 months after their respective filing dates. In contrast, the Government action has been pending for 60 months.

that this was a "so-called requirement" (meaning that it was not a requirement at all) "propounded without explanation or citation". (II App, I, at 165a) The Government had never argued for this construction of the *Mine Workers* case and, in dissent, Judge Timbers found that decision "utterly emasculate[d]" by the majority.*

The Court of Appeals also held that IBM "waived" its right to insist upon proof and findings concerning any harm to the Government "by objecting to the evidence of it". (II App. I, at 165a) IBM did object to the Government's offer of evidence, but the objection was made because—and only because—the district court had previously ruled

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* Judge Timbers wrote:

"The majority's suggestion that the district court's failure to 'consider the character and magnitude of the harm threatened by continued contumacy', *United States* v. *UMW, supra,* 330 U.S. at 304, is of no importance, strikes me as a side-stepping of what I had thought, prior to today's majority opinion, to be a decision of the Supreme Court binding upon our Court. The majority says that the district court's refusal to weigh this consideration does not transform 'what would otherwise be civil contempt into a criminal contempt.' *Supra,* p. 5632. This ignores the stated purpose of the district court in holding IBM in contempt, and of the government in seeking to have it held in contempt. With due respect, I must say that the majority's strained reading of *UMW* as requiring merely 'that the coercive fine be reasonably set in relation to the facts, that it not be arbitrary', utterly emasculates that landmark decision of the late Chief Justice Vinson. How can a contempt fine be reasonably or non-arbitrarily set if the 'facts'—i.e. the harm caused by the contumacious conduct, as well as the character and magnitude of that conduct—are not even explored? It would have been no more impossible to determine the harm sustained in the instant case than it was to determine the harm caused by the nation-wide coal miners' strike in *UMW.* Furthermore, the district court's failure to consider this issue affects not merely the *amount* of the fine, as the majority suggests; it goes directly to the *nature of the contempt adjudication. United States* v. *UMW, supra,* 330 U.S. at 304." (II App. I, at 183-184a)

the subject matter (*i.e.* harm) irrelevant, on the Government's motion.*

The only articulated basis for the district court's "belief that a substantial fine is required" was "the desire of the court to insure that its order [the Waiver Order] be promptly obeyed." (II App. E, at 98a) This is the hallmark of a "criminal" contempt and has no proper role in a "civil" proceeding, but this was ignored by the Court of Appeals' majority when it held that the Order had "a clearly civil purpose". (II App. I, at 165a)

It is also clear from the district court's Contempt Order, both from the amount of the penalty it set and its refusal to stay enforcement, that by "promptly" the district court meant without opportunity for appellate review.** Yet it was the very desire for such appellate review that led to the contempt proceedings in the district court. All that IBM has ever sought is an expeditious appellate determination of the merits of the Waiver Order and the substantial issues underlying it. That IBM's challenge to the Waiver Order is not frivolous is best demonstrated by the fact that the only appellate judges to reach

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* IBM's objection merely conformed to the ruling made at the Government's request (which the Government then proceeded to ignore by offering what it claimed was proof of harm); the majority's conversion of IBM's objection into IBM's "waiver" of another substantive right demonstrates again the error and substantial prejudice of not confining the concept of "waiver" to situations where there is plainly "an intentional relinquishment or abandonment of a known right or privilege". *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938).

** There never was any issue concerning whether the Waiver Order would be complied with if upheld on appeal. IBM has repeatedly stated it would comply in that event. It has also repeatedly offered to produce the documents at any time for a determination of the validity of its privilege claims. So there is no defiance of Judge Edelstein's authority here and, consequently, no need whatsoever to "vindicate" it.

the merits, a panel of the Second Circuit, vacated the Order as a "clear abuse of discretion" and "usurpation of power" which "disrupts the administration of justice in the federal courts."* (471 F.2d at 512, 516-17; App. K, at 47a, 56a)

Over the Government's strenuous opposition, however, the same panel of the Second Circuit which held that Court without jurisdiction to review the Contempt and Waiver Orders also unanimously granted a stay of its mandate (and thus of the two orders) under Fed. R. App. P. 41(b). Under that Rule, the stay will continue until "final disposition" by this Court. The stay, we believe, can be taken as acceptance of IBM's argument that the Court most familiar with the controversy and the underlying merits of IBM's position on the Waiver Order should act (despite its found lack of jurisdiction on the merits) to assure that IBM's right to seek review in this Court would not be prejudiced.

The Government—acting more like a sharp private litigant than a representative of the broad public interest —not only opposed any stay by the Court of Appeals or by the district court, but also flatly opposed IBM's motion in the district court that any contempt order issued be one which, in form, was plainly appealable to the Court of Appeals. This was *after* the Government stated on four separate occasions in this Court and the Court of Appeals that IBM's appeals were the wrong route and that a proper way to secure review of the Waiver Order was for IBM "or its representative" to risk contempt and thereby demonstrate the good faith and solid basis for their objections to the Waiver Order. (II App. M, N, O & P)

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* The Court of Appeals subsequently held *en banc* (4-2) that it lacked jurisdiction to review the Waiver Order on the merits. IBM previously has petitioned this Court for a writ of certiorari to review the Second Circuit's *en banc* decision [*petition for cert. filed,* 42 U.S.L.W. 3033 (U.S. June 11, 1973) (No. 72-1662)].

The Government's unconscionable abandonment of this position came as soon as it had the opportunity to seek enforcement of the Waiver Order.

On June 15, 1973, with all stays of the Waiver Order having expired, IBM's senior counsel, Bruce Bromley, respectfully and reluctantly asked the district court to hold him in contempt so as to resolve expeditiously the substantial legal questions underlying the Waiver Order—questions which even the district court's contempt decision concedes are of "significant interest" and which arise out of what the Court of Appeals has termed a "unique factual situation". (II App. H, at 148a; II App. I, at 169a)

But once the die had been cast, the Government suddenly changed its position and demanded contempt sanctions in excess of $175,000 per day against IBM, and not against a non-party representative of IBM, believing this would make the Waiver Order unappealable and trying to coerce IBM into foregoing any attempt to seek review on appeal. The Government renounced its repeated prior representations in this Court and the Court of Appeals concerning the appropriateness of the contempt route to appeal, and instead urged now that those representations should not be "looked at or honored". (II App. B, at 15a)

The district court accepted the Government's unseemly suggestion, entered an unprecedented daily fine of $150,000, and simultaneously denied a stay pending appeal. In so doing, it ignored the motion of IBM's counsel that Mr. Bromley or his firm be held in contempt and nominally fined so as to permit prompt and sure appellate review on the merits. And, as noted above, it separated out—artificially and erroneously, we submit—the "issues" of "fine" and "harm", deferring for some unspecific future time a

hearing on the "harm issue"—a hearing which has not been held.*

Reasons For Granting The Writ

IBM's concurrently-filed application for "all writs" review shows why review is required of the Contempt Order and the underlying Waiver Order. In this paper we shall show that review is also warranted of the Court of Appeals' decision that it lacked jurisdiction to review the Contempt Order (and the underlying Waiver Order) because, in so holding, the Court of Appeals decided an important federal question which has not been but should be settled by this Court, has misapplied applicable decisions of this Court, and, as the consequence of its decision that it lacks jurisdiction, has permitted to stand such a grievous departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The district court's Contempt Order, which the Court of Appeals held to be nonappealable, squarely fits neither the definition of a civil contempt nor of a criminal contempt.

The record compels the conclusion that this unusual Order was the product of the desire of the district court and of the Government to enter a punitive order which would be immune from appellate review. Thus, the form of order suggested by the Government and adopted by the district court was an attempt to fall within the rule of *Fox* v. *Capitol Co.*, 299 U.S. 105 (1936), which held the order of civil contempt against a party to the action not appeal-

* The district court also ignored IBM's respectful and reluctant request that it be plainly held in criminal contempt (II App. K) and it refused to entertain the motion of IBM's counsel, Cravath, Swaine & Moore ("Cravath"), to intervene as of right in order to protect its work-product interest in documents covered by the Waiver Order. The district court's denial of Cravath's intervention motion is the subject of a concurrently-filed direct appeal to this Court by Cravath under § 2 of the Expediting Act.

able.* But this Court, in *United States* v. *United Mine Workers of America, supra*, 330 U.S. at 303-304, plainly held that the basis of any "civil" contempt order is some showing of the harm suffered by the opposing party as a result of noncompliance with the underlying order. Here, there was no proof of any harm suffered, let alone harm that in any way could justify the punitive fine which, in the district court's view, was necessary to vindicate its authority. But while the district court abrogated the necessity of showing any harm, to give the order the trappings of a "civil" contempt, the astronomical fine imposed was in form made "purgeable" and the Order was labeled as a "civil" contempt.

The resulting Order has substantial attributes of an order of criminal contempt, and one—purgeability—of civil contempt. It can be viewed as a hybrid order. If so treated, no decision of this Court has dealt squarely with the appealability of such an order, although there is ample authority that an order partly criminal and partly civil in nature is appealable. This Court should pass upon this question and should hold that the Order below, however viewed (*i.e.*, as criminal, partly criminal, or hybrid) is appealable.

And, fundamentally, the result should be the same even if this Court were to agree with the Court of Appeals and characterize the Order as "civil"; where formal labels obscure analysis and do not and cannot alter the practical

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* For reasons stated *infra* (at 13-14), we believe *Fox v. Capitol Co.* distinguishable under the circumstances here because (i) the contempt order here is completely final and separate from the antitrust case, (ii) unlike *Fox*, purging the contempt order here by producing privileged documents for examination by a litigant results in immediate and irreparable injury while purging the *Fox*-type contempt is a meaningful alternative to remaining in contempt, and (iii) unlike *Fox*, this contempt proceeding involves a good faith challenge on an appropriate ground to the underlying validity of the order sought to be enforced.

consequences of the order, they should be disregarded. When they are disregarded and attention paid to the practical consequences of the Contempt Order, it is the kind of order from which appeals are (and should be) permitted.

The record here is clear that the Order appealed from basically sought to vindicate the district court's authority. It had no relationship to any harm suffered by reason of noncompliance with the underlying order, and while the astronomical fine is purgeable by the contemnor, it is purgeable only at the price of suffering irreparable damage. Either way—paying of the fine, or disclosing the privileged documents—the consequence of the Order is to inflict irreparable injury or punishment on IBM.

A majority of the Court of Appeals accepted the "civil" contempt label, focused upon the Order's theoretical purgeability, disregarded the devastating and irreparable consequences of purging (which make purging only a theoretical alternative), overlooked the trial court's avowed purpose to vindicate its authority, found that proof of the harm suffered by noncompliance was not a necessary element in civil contempt, and concluded that the Order was nonappealable.

The result, in this era of growing government interference with the rights of individuals, is to vest in the district courts an awesome power to issue and fashion punitive but nonreviewable contempt orders, where the consequences of compliance are as devastating as the consequences of defiance, and thereby to coerce compliance with their orders, even if an order is—as the order in this case has been characterized—a "gross abuse of discretion" and a "usurpation of power" which "not only violates the rights of a private party (IBM) but also disrupts the administration of justice in the federal court system". (471 F.2d at 512, 516; App. K at 47a, 56a)

All of this resulted from what we believe to be a misapplication of the rule in *Fox* v. *Capitol Co.*, and a clear

failure to follow the requirements laid down for civil contempt by this Court in *United Mine Workers*. *Fox* held a civil contempt order against a party to be nonappealable. But the order in *Fox* was a genuine civil contempt order, related to the harm suffered by reason of noncompliance with the underlying order, and purgeability was a meaningful alternative.* The Court of Appeals misapplied *Fox* and also disregarded the doctrine of *United Mine Workers* that in assessing a civil fine the court "must . . . consider the character and magnitude of the harm threatened by continued contumacy . . ." 330 U.S. at 303-304. In addition, the Court of Appeals disregarded holdings by it and by this Court that where, as here, a civil contempt against a party has essential elements of finality, and where the sanctions are unrelated to the relief sought in the main case, even if denominated a civil contempt, the order is appealable.

We submit that the Court of Appeals has jurisdiction—even in what is otherwise an Expediting Act case—to review the sort of contempt order entered here (which cannot, because of its immediate irreparable effect, practically be reviewed after final judgment) because the Contempt Order is either wholly or partially criminal in substance, and because, even if the district court's conclusionary characterization of the Order as "civil" is accepted, this Court's decisions show that this Contempt Order is in every meaning-

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* *Fox* involved a judgment debtor held in contempt for failing to respond to a subpoena requiring his attendance at a supplementary proceeding for examination by his creditor. 299 U.S. at 106. The judgment debtor had confessed judgment (Statement and Confession of Judgment, *Capitol Co.* v. *Fox*, No. L 59-192 (S.D.N.Y. May 3, 1935)), and judgment had been entered on the confession (Judgment, *Capitol Co.* v. *Fox*, No. L 59-192 (S.D.N.Y. July 18, 1935)). Thus, noncompliance with the subpoena was not a challenge to the validity of the underlying judgment. Moreover, the absence of an appeal cost the judgment debtor nothing he had not already given up by his confession of judgment since the civil sanction imposed was incarceration pending his decision either to comply with the subpoena or to pay a fine in the amount of the unpaid judgment.

ful sense "final"; and since it was entered in a proceeding separate from the antitrust action below, it is outside the scope of the Expediting Act, 15 U.S.C. §29.

A. The Contempt Order is Final Because it is Essentially a Criminal Contempt Order.

It is conceded by the Government and by the majority in the Second Circuit that, if the Contempt Order is criminal in nature, it is appealable to the Court of Appeals. (See II App. I, at 161a-162a)* We submit that, as Judge Timbers stated,

> "Viewed realistically, the clear purpose and effect of the [contempt] order is criminal in nature." (II App. I, at 181a)

While the distinction between civil and criminal contempt is a murky one, and has been the subject of innumerable attempts to draw a fine line, the district court left no doubt that the purpose of its Contempt Order was punitive —to vindicate the trial court's authority.

That was the theory advanced by the Government (which argued that the Contempt Order was necessary "to insure . . . respect for the court's orders by IBM" and "to vindicat[e] . . . this Court's authority to issue and enforce such orders");** and that was the justification accepted and

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* Even if some part of the Contempt Order could properly be treated as a "civil" contempt, the fact that any part of it is criminal in nature is sufficient to permit immediate appeal from the entire Order. *Union Tool Co.* v. *Wilson,* 259 U.S. 107, 110 (1922); *In re Merchants' Stock and Grain Co.,* 223 U.S. 639, 642 (1912); *In re Christensen Engineering Co.,* 194 U.S. 458, 461 (1904).

** These statements were contained in briefs submitted by the Government in the contempt proceedings in the district court, but, as Judge Timbers wrote:

> "The majority further ignores the purpose for which the government argued that the contempt order should issue. At the July 16, 1973 hearing, government counsel argued that IBM

announced by the district court (which wrote that the Contempt Order was based on "the desire of the court to insure that its order [the Waiver Order] be promptly obeyed" (II App. E, at 98a)). Indeed, the district court had no other basis on which to enter the Contempt Order since it ruled irrelevant—and therefore permitted no discovery, took no evidence, and made no findings on—any harm to the Government arising from noncompliance with the Waiver Order.

The Contempt Order also is criminal in nature because, as Judge Timbers put it, "[b]y completely excluding the issue of damages in straining to frame a civil remedy," the district court ignored the rule of this Court that in assessing a "civil" fine to assure compliance the court "must . . . consider the character and magnitude of the harm threatened by continued contumacy . . ." *United States* v. *United Mine Workers, supra,* 330 U.S. at 303-304. (II App. I, at 181a) Here, the district court gave no such consideration.

Moreover, we are not aware of any contempt order ever issued, let alone any order of civil contempt, resembling in any way the severity of the penalties the district court imposed here.

Simply labeling the order "civil contempt" and adopting formal boilerplate recitals cannot prevent the appellate courts from determining the true nature of the Order.

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should be held in contempt because of the necessity 'to have a precedent in this Court that IBM will obey the Court's orders and will obey them promptly and will obey them as they are directed to obey them and not on the basis of whether they want to or don't want to.' Transcript of July 16, 1973 Hearing, at 6. The government's purpose in seeking contempt clearly was to punish past conduct and to deter future conduct. This is a criminal sanction. *McCrone* v. *United States,* 307 U.S. 61, 64 (1939); *MacNeil* v. *United States,* 236 F.2d 149, 154 (1 Cir.), *cert. denied,* 352 U.S. 912 (1956); *United States* v. *International Union, United Mine Workers,* 190 F.2d 865, 873 (D.C. Cir. 1951)." (II App. I, at 182a-183a, n.7)

It is the "character and purpose" of the Contempt Order which determine whether the citation was for criminal or civil contempt. *United States* v. *United Mine Workers, supra,* 330 U.S. at 303-304; *McCrone* v. *United States,* 307 U.S. 61, 64 (1939).

As the Court said in *McCrone, supra,* 307 U.S. at 64:

> "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." (Footnotes omitted)

Not only was the proceeding below not "wholly remedial," it was not remedial at all, since Judge Edelstein prevented any consideration of whether any harm had occurred or would occur by the withholding of documents pending appellate review of the Waiver Order. In so doing, the Court excluded from its consideration the basis for any civil contempt sanction.

Moreover, as Judge Timbers observed, the record below is "crystal clear" that the district court's failure to comply with the "indispensible requirements for a civil contempt adjudication was deliberate and not inadvertent":

> "In its order of July 3, 1973 scheduling a hearing for July 16 'limited to the issues of the fine and damages to be assessed against [IBM] for its alleged contempt', the court excluded any consideration of the 'character and magnitude' of the threatened harm and the 'effectiveness' of any suggested sanction. Moreover, by its order of July 10, the court excluded from the July 16 hearing any consideration of the 'question of damages' caused by IBM's alleged contumacious conduct. Thus, the only evidence before the court was IBM's balance sheet." (II App. I, at 181a-182a)

In brief, it is fundamental to and inherent in the nature of a "civil" contempt that harm or injury to the complaining party be the interest shown and found to be served by the sanction because "contumacy non-injurious to the adverse party . . . if contempt at all . . . is criminal." Comment, *Civil and Criminal Contempt in the Federal Courts,* 57 Yale L.J. 83, 99 n.93 (1947).*

But in this case, the purpose sought to be accomplished by the Contempt Order is not to remedy any harm suffered by the Government. There was no consideration, no proof and no finding of harm. The size of the fine, the selection of the form of the remedy, the failure to act upon Cravath's motion to intervene, the denial of the motion for a plainly appealable order, and the entire tenor of the

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* In a civil contempt proceeding "the complainant in the main cause is the real party in interest with respect to a compensatory fine or other remedial order in a civil contempt proceeding . . ." *Parker* v. *United States,* 153 F.2d 66, 71 (1st Cir. 1946). As a result, a compensatory fine must be based on hearing evidence of "actual loss" or damage to complainant. *United States* v. *United Mine Workers, supra,* 330 U.S. at 304; *see also Yanish* v. *Barber,* 232 F.2d 939, 947 (9th Cir. 1956). For example, in *Boylan* v. *Detrio,* 187 F.2d 375 (5th Cir. 1951), the court stated the rule that "a civil contempt exists *only* where there is a disobedience of court orders to the *damage of the other party.* . . ." 187 F.2d at 379 (emphasis added). *See also United States* v. *Aberbach,* 165 F.2d 713, 715 (2d Cir. 1948) (there must be a "reasonable relationship between fine and damages"); *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.,* 135 F. 774, 782 (2d Cir. 1905); ("It is obvious that a fine exceeding the indemnity to which the complainant is entitled is purely punitive"); *McKee Glass Co.* v. *H. C. Fry Glass Co.,* 248 F. 125, 127 (3rd Cir. 1918). (" 'In fixing penalties for civil contempts, it seems to the court important that care should be taken to give the plaintiff full compensation for the injuries sustained, *and not more*' "). (Emphasis in original) There are also cases, particularly those involving witnesses who refused to testify before grand juries, where imprisonment is used as a civil contempt sanction. *See, e.g., Shillitani* v. *United States,* 384 U.S. 364 (1966). But even in such cases the question is "what does the court primarily seek to accomplish by imposing sentence?" (384 U.S. at 370)

proceedings in the district court made it clear that the principal—if not the sole—purpose was to punish IBM if it failed to bow to the court's power over it, to vindicate the court's authority, and to prevent any challenge to that authority in any other court.

Purgeability does not erase the essentially criminal aspects of the Order, especially when the consequences of purging are, as they are here, the inflicting of irreparable injury.

In these circumstances, the Order is criminal, in whole or in part. In either event, it is final for purposes of appeal. The only nonfinal element is which form of punishment IBM shall suffer.

B. The Contempt Order is Final (Whether Criminal, Civil, or Both) Because the Damage Occasioned by the Order is Immediate and Irreparable Whether IBM Produces the Privileged Documents or Pays an Astronomical Fine.

Even if the Contempt Order is properly regarded as "civil", it is nevertheless appealable under the principles laid down by this Court in *Reisman* v. *Caplin*, 375 U.S. 440 (1964), and *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), and by the Second Circuit in *New York Telephone Co.* v. *Communications Workers*, 445 F.2d 39 (1971). Here, as in those cases, there is a good faith challenge to the validity of the underlying order, the order effects rights which are very important, and appeal should be available to test the validity of the challenge.

Reisman was an action brought by lawyers seeking to set aside summonses directing the production of documents assertedly protected by attorney-client and work-product privileges. So that "no injury [would be suffered] by testing the summons", the Court held that, "whether the contempt be of a civil or criminal nature", it is "appealable". (375 U.S. at 449)

In *Reisman*, sections of the Internal Revenue Code which authorized the summons procedure were challenged on the ground that

> "the penalties of contempt risked by a refusal to comply with the summonses are so severe that the statutory procedure amounts to a denial of judicial review". (375 U.S. at 446)

The Court found the Internal Revenue Code procedures constitutional because their punishment procedures do "not apply where the witness appears and interposes good faith challenges to the summons". 375 U.S. at 447. The Court noted that, so long as the challenge is in "good faith", no punishment could be imposed and "the witness may challenge the summons on any appropriate ground". 375 U.S. at 449. An "appropriate ground" was specifically held to include an assertion that the documents requested were "protected by the attorney-client privilege". (*Id.*)*

Reisman rests upon more than fifty years of constitutional law developed as a result of attempts, like those made here, to obfuscate, penalize or prevent judicial review. *See Ex Parte Young*, 209 U.S. 123, 147 (1908); *Wadley Southern Ry. Co.* v. *Georgia*, 235 U.S. 651, 661-662 (1915); and

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* *See also United States* v. *Roundtree*, 420 F.2d 845 (5th Cir. 1970) (contempt order enforcing summons stayed and ultimately reversed, relying upon *Reisman*, and stating that

> "[h]ere . . . [the person held in contempt] stood to forfeit his defenses entirely [if he complied with the subpoena]", and
> "[h]ad . . . [the person held in contempt] testified or produced his records on the appointed dates, he would of course have mooted the appeal" (420 F.2d at 853));

Harris v. *United States*, 413 F.2d 314 (9th Cir. 1969) (relying upon *Reisman* in granting an attorney a stay of an order denying a motion to quash a subpoena directed to a bank which called for production of documents the attorney claimed were privileged); *Wilmot* v. *Doyle*, 403 F.2d 811 (9th Cir. 1968) (relying upon *Reisman* (403 F.2d at 814 n.5) and reversing an order holding an NLRB attorney in contempt for failure to produce documents).

Oklahoma Operating Co. v. *Love,* 252 U.S. 331, 336-337 (1920).* Thus, this Court wrote in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 226 (1961):

> "As it was said in *United States* v. *Morton Salt Co.,* 338 U.S. 632, 654 (1950), 'we are not prepared to say that courts would be powerless' to act where . . . orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity." *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 226 (1961).**

Here, the sanctions sought by the Government and imposed by the district judge are so enormous that they necessarily would in effect prevent any appeal at all. Yet here, as in *Reisman,* there is no question but that IBM and Cravath have sought an appeal in "good faith" and on "an appropriate ground". Due process, then, as interpreted by this Court, requires that there be an appeal here so as to test the merits of the Waiver Order.

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* The constitutional principle at work—inherent in the right to due process—was first developed in cases, such as those cited above, where a statute or administrative regulation was sought to be tested but judicial review was impeded, and compliance coerced, by penalizing disobedience during the period of the test. Obviously, the same principle applies to the decision of a federal district judge. For no rational distinction can be drawn between a judge's decision and the collective decision of a legislature or agency. A constitutional principle applicable to one must equally be applicable to the other—and, in *Reisman,* this Court so held.

** That contempts in situations like this do not normally raise this kind of problem can be seen from cases like *United States* v. *Costello,* 16 F.R.D. 428 (S.D.N.Y. 1954), *aff'd,* 222 F.2d 656 (2d Cir.), *cert. denied,* 350 U.S. 847 (1955), where the court issued a contempt citation which allowed immediate review of a discovery order involving a claim of privilege. The court held that a "just" order was a $500 fine, stayed on the condition that an appeal was diligently prosecuted. *See also Appeal of Securities and Exchange Comm'n,* 226 F.2d 501 (6th Cir. 1955) and *Chapman* v. *Goodman,* 219 F.2d 802, 807 (9th Cir. 1955).

Whatever might be the relevance of the Expediting Act in the absence of a contempt citation raising the constitutional principle of *Reisman**, it is clear that the Expediting Act should not be interpreted so as to raise the question of its constitutionality:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Crowell v. *Benson*, 285 U.S. 22, 62 (1932) (Hughes, C. J.); quoted in Mr. Justice Brandeis' opinion in *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936); *accord United States* v.

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* The *Reisman* principle that there be no substantial sanctions imposed until there has been an opportunity for judicial review was also followed in one of the cases the Department quoted from in its Motion to Dismiss or Affirm in No. 72-1173 to support the proposition that contempt orders against IBM or its representatives "are the only routes available for review of pretrial orders requiring testimony or the production of evidence" (p. 16). The Department's quotation was from *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971), where the Court said:

> ". . . [W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt *if* his claims are rejected on appeal. . . ." (Emphasis added.)

The "necessity for expedition in the administration of criminal law" is the same policy as that served by the Expediting Act in the administration of antitrust law. But just as in the context of criminal law, that policy is not frustrated (and, in fact, it is best served) by resolution of a serious claim that an order is invalid and will cause great harm in an appeal from a contempt order. We know of no decision by any court applying the Expediting Act to a contempt proceeding, and this is not surprising since the Expediting Act was never meant or thought to reach a situation like this.

Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); *Dennis* v. *United States*, 341 U.S. 494, 501 (1951); *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 407 (1950); *United States* v. *CIO*, 335 U.S. 106 121-122 (1948): *United States* v. *Delaware & Hudson Ry.*, 213 U.S. 366, 407-408 (1909).

Reviewability of the contempt order is also demonstrated by the principles underlying this Court's decision in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), and by the Second Circuit's own decision in *New York Telephone Co.* v. *Communications Workers*, 445 F.2d 39 (1971). In *Sibbach*, as here, there was an appeal from a civil contempt order against a party where the contemnor's purpose was to make a good faith challenge to the underlying order (to submit to a physical examination). Compliance with the order resisted there, as here, was not a meaningful alternative course of conduct because it would have caused irreparable injury to the interest for which protection was sought and thus substantially impaired any subsequent challenge to the underlying order.

Similarly, the decision of the Second Circuit in *New York Telephone Co.* v. *Communications Workers*, 445 F.2d 39 (2d Cir. 1971), is square authority for finality—and appealability—in the circumstances of this case. There, in sharp and inconsistent contrast with its decision in this case, the Court held that an order holding the defendant union in civil contempt was final and appealable. The order imposed a substantial daily fine until such time as the union abandoned a strike. The amount of the fine there was substantially less than the amount of the fine here.

In finding the contempt order to be final and appealable, the Court found that:

> (i) ". . . execution issued immediately and the collateral proceeding has been concluded" (445 F.2d at 45);

(ii) "[j]udgments were entered on these findings of civil contempt and orders setting the fines" (*id.*);

(iii) "the district court's decision on this aspect of the case was not tentative" (*id.*);

(iv) "our intervention by way of appeal runs no risk of disrupting the orderly course of proceedings below" (*id.*);

(v) "[t]he cute phrase 'he carries the keys of the prison in his own pocket' . . . bears little relation to the instant case as it reaches us" (*id.* at 46); and

(vi) finally, "The Company's reliance upon *Fox* v. *Capitol Co.*, 299 U.S. 105 (1936) [to defeat an appeal], is misplaced. There, an order finding the judgment debtor in civil contempt for his refusal to submit to an examination in proceedings supplementary to judgment was held to be nonreviewable because the proceeding was in its initial stages and the final relief was a matter of conjecture. *Id.* at 108. In the present case, the execution issued immdiately and the collateral proceeding has been concluded." (445 F.2d at 45)

So here.

The contempt proceeding was "collateral" and "has been concluded", the Contempt Order is entered and the fine set, nothing about the district court's conclusion was "tentative", there is "no risk of disrupting the orderly course of proceedings below", having the "keys of the prison" by having the theoretical ability to pay the fine is a "cute phrase" meaningless in the circumstances, and "reliance" on *Fox* v. *Capitol Co.* is "misplaced".*

In fact, unlike the relatively rare situation present here and that in *Reisman*, *Sibbach* and *New York Telephone*, it

* The Second Circuit majority distinguishes that Court's decision in *Telephone* on that Court's passing comment expressing "doubt" about what was left of the main action. (II App. I, at 167a) That "doubt" cannot take away from all the other reasons why the civil contempt order there was held appealable, each of which fit this case like a glove.

is only in the much more frequently occurring cases like *Fox*—where there was no challenge to the validity of the underlying order (on a "good faith" basis or any other ground) and where compliance with it would not cause irreparable injury or undercut the challenge itself—that immediate appeal has been denied.

C. If Not an Appealable Criminal Contempt, or an Appealable Final, Separable Civil Contempt, the Order Below Is Hybrid and Is Appealable.

No rule of law says that only criminal contempts against a party are appealable. No rule of law says that the Court of Appeals lacks jurisdiction over a contempt order unless it squarely fits prior definitions of criminal contempts. No rule of law says that a purgeable contempt order is necessarily nonappealable.

The issue is whether or not the order entered below has all those attributes, or such a sufficient number of attributes, as did the civil contempt order in the *Fox* case, so that a perceptive application of that precedent requires a finding of nonappealability.

The Order below does not match the order in the *Fox* case. It is not a "civil contempt" in the classical sense.

It has all the elements of finality which commend its reviewability. It is unrelated to the main case because the judge below severed its relationship to the main case when he refused to make any findings or hear any evidence as to the harm suffered by the complainant below as a result of noncompliance.

All of the considerations noted by Judge Timbers which lead to the conclusion that the Order is in essence an order in criminal contempt, and therefore appealable, also commend the conclusion that, if the Order be treated as the hybrid that it may be viewed as being (because of the purgeability element), it nevertheless should be accorded the same reviewability on appeal as a criminal contempt.

D. The Contempt Order Is Outside the Scope of the Expediting Act Because It Is Separable from the Government's Antitrust Case.

If the Contempt Order is criminal in nature, then it may immediately be reviewed by the Court of Appeals without running afoul of the Expediting Act.

In addition, we submit, that no Expediting Act issue arises even if the Contempt Order be found civil (yet final under the principles discussed above) because it is separable from the antitrust case. It is separable because both the Government and Judge Edelstein separated it from the antitrust case and because the sanction imposed by the Contempt Order (and sought by the Government) is separate, different and distinct from the relief sought in the Government's antitrust case.* And while the Government initially sought the contempt order because of alleged harm to its prosecution of the antitrust case, that position did not long survive.

For the district court severed the issue of what it would take to force IBM to comply with the Waiver Order from the issues relating to the impact of noncompliance on prosecution of the antitrust case by his order of July 10.

By that order, the district court ruled irrelevant any harm or injury or damage to the plaintiff in the prosecution of its antitrust case. And, the district court took no evidence on the impact, if any, of noncompliance on the antitrust suit. He made no findings on that question. Accordingly, the record contains no evidence and no find-

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* The cases which the Government cited to the Court of Appeals in support of its claim that appeal from a civil contempt judgment in a government antitrust action lies only to this Court are inapplicable here since in each case cited the critical point at issue was the interpretation and enforcement of the final judgment in the antitrust case. Clearly, an appeal in such a proceeding must go directly to this Court under the Expediting Act. *See United States* v. *California Cooperative Canneries,* 279 U.S. 553 (1929).

ings to connect the Contempt Order with the further prosecution of the antitrust case, or the relief there sought.

Moreover, the court below, as noted, made it clear that the dispute over compliance with the Waiver Order was one between it and IBM rather than between the plaintiff and IBM. Indeed, even the Government urged the entry of the contempt order, not to make the Government whole, but to vindicate the Court's authority—and the Court expressly entered the Order to accomplish that result.

As pointed out above, in our view this makes the contempt order a criminal one. But whether the Order be considered criminal, civil, or hybrid, the district court's separation of these issues plainly makes the Order separate from the antitrust proceeding and therefore outside the scope of the Expediting Act.

In addition, the sanction imposed by the Contempt Order is separable from the relief sought in the antitrust action. There are situations in which a contempt order provides a sanction which is squarely related to, and within the scope of, the action from which the order emanates. Such was the case in *Fox* v. *Capitol Co.*, 299 U.S. 105 (1936), where the fine imposed was the amount of the judgment previously entered upon confession of judgment against Mr. Fox. Such would be the case if in an action for specific performance the defendant were directed by the contempt order to convey the property which was the subject matter of the action and provided that, if he failed to do so, the court would do it for him.

Such is not the case here. IBM could pay the fine imposed (if it could conceivably afford it) and the antitrust action would be totally unaffected. If the fine were paid, the Government still would have none of the relief directly or indirectly sought in its complaint. In contrast, in *Fox*, if the fine had been paid, the plaintiff would have had the relief sought in the main action.

The record, in short, we submit, demonstrates that by the Government's choice,* by the district court's choice, and by the nature of the sanction granted, the contempt order is separable from the antitrust case and appealable to the Court of Appeals. It is difficult to find any justification for suggesting that issues such as those raised by the Contempt Order were intended by Congress to be resolved by this Court and only after final judgment on the merits of the antitrust claim.

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* The Government not only sought a contempt sanction which was separate from the relief sought in its antitrust case, but it deliberately chose *not* to seek any other sanctions available under Rule 37(b) which would have, directly or indirectly, related to the antitrust action. Indeed, it is the very lack of relationship between the enforcement of this Order and the Government's antitrust case which makes any of these sanctions inappropriate, even in the Government's view.

CONCLUSION

For the above reasons, IBM urges this Court to grant this Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit (or, alternatively, to grant IBM's concurrently-filed Petition for a § 1651(a) Writ).

January 7, 1974

Respectfully submitted,

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EXHIBIT A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York.

Respondents.

MOTION FOR LEAVE TO FILE AND TO TREAT ANNEXED PETITION FOR A WRIT OF CERTIORARI AS A PETITION FOR A COMMON LAW WRIT OF CERTIORARI

In the event this Court holds that the above-captioned case was not "in" the Court of Appeals within the meaning of 28 U.S.C. § 1254(1), Petitioner International Business Machines Corporation ("IBM") respectfully moves this Court for leave to file, and to treat, the annexed Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit as a Petition for a common law writ of certiorari pursuant to 28 U.S.C. § 1651(a).

As so filed and treated, this common law Writ of Certiorari is directed to the United States Court of Appeals for the Second Circuit to review an order and judgment of that Court entered on December 17, 1973, which determined (2-1) that the Court of Appeals for the Second Circuit did not have power to entertain IBM's appeal (and concurrent Petition for Extraordinary Writ) to review a Contempt Order of the United States District Court for the Southern District of New York entered on August 1, 1973. The Contempt Order is predicated on noncompliance with a pre-

vious order (the Waiver Order) held unlawful by the only judges to reach the merits.

The Waiver Order orders IBM immediately to produce privileged documents to the Government on the grounds that IBM's previous production of those documents to a third party, pursuant to pretrial orders of the United States District Court for the District of Minnesota in a related case, constituted a waiver of IBM's attorney-client privilege despite uncontroverted facts (i) that IBM did everything humanly possible to prevent disclosure of its privileged documents, (ii) that the United States District Court for the District of Minnesota had, in the interest of expedition, ordered IBM not to take a final crucial step in IBM's privilege review process, and (iii) that the same United States District Court had concurrently entered a protective order expressly preserving IBM's privilege claims.

For the violation of the Waiver Order found by the District Court, IBM was held in contempt and directed to pay a continuing fine in excess of one million dollars per week.

January 7, 1974

Respectfully submitted,

.....

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STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1291 and § 1651(a) and 15 U.S.C. § 29 which provide as follows:

28 U.S.C. § 1291

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. § 1651(a)

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Expediting Act of 1903, as amended (15 U.S.C. § 29)

"In every civil action brought in any district court of the United States under any of said [anti-trust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."